JD-122-04
Chicago, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 1, AFL-CIO

and Case No. 13-CA-41636

REMZI JAOS, AN INDIVIDUAL

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for the General Counsel.
Marvin Gittler, Esq., (Asher, Gittler,
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Chicago, Illinois, for the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois on October 20, 2004. Remzi Jaos filed a charge on January 20, 2004 alleging that Respondent, the Service Employees International Union (SEIU), Local 1, engaged in an unfair labor practice by terminating his employment as a business representative/organizer on November 17, 2003. Based on this charge, the General Counsel issued a complaint on March 4, 2004, alleging that Respondent violated Section 8(a)(1) of the Act by discharging Jaos for concertedly complaining to Respondent about the working conditions of Respondent's employees and requesting changes to the manner in which work assignments were being made.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, an unincorporated association, is a labor organization, and represents approximately 40,000 employees, including janitors, building engineers, doormen and security guards, in collective bargaining. Its principal office is in Chicago, Illinois. During 2003 and 2004 Respondent collected dues and/or initiation fees in excess of $50,000 from its members and remitted in excess of $50,000 of dues and/or initiation fees from its Chicago office to the international union in Washington, D.C. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

Remzi Jaos, a member of SEIU Local 1, was hired by the Union in 1996 as a business representative/organizer. Until October 2003, his job entailed representing SEIU members employed in residential apartments and condominiums. In doing so, Jaos performed a variety of tasks including organizing, political education, grievance handling, visiting members at their place of employment, collecting dues and initiation fees and negotiating contracts. He performed his tasks within a specific geographic area of Chicago to which he was assigned.

In October 2002, Union President Thomas Balanoff appointed a committee to study the Union's method of servicing its members. In October 2003, the Union implemented the committee's recommendations, which called for the centralization of certain functions in a call center and a much more specialized role for its business representatives. Under the new system, five business representatives were assigned to the call center, which was to receive all telephone calls from members and employers throughout the Union's jurisdiction, which covers the Chicago metropolitan area, St. Louis, Kansas City and the State of Wisconsin. This call center disposes of 65% of the incoming calls and refers the other 35% to a grievance center staffed by eight business representatives. These representatives' sole responsibility is the processing of grievances. Another 15 business representatives were assigned to a field center. The tasks of the field center representatives include organizing, dues collection, member visits and political education.

The Union assigned Remzi Jaos to the grievance center. Jaos was not happy with the change in the scope of his responsibility. Jaos, the General Counsel's only witness, testified that he discussed his concerns about the new system with a number of other employees and suggested to some that they meet with the Union's President, Thomas Balanoff, to discuss these concerns. Since this testimony is uncontradicted, I credit it.

Jaos told Business Representative Anton Farby that he was getting a lot of complaints about the new system. Farby replied that he was getting a lot of complaints also and that he didn't think the new system was working well. Farby also commented that he was confused as to what he was supposed to do regarding completing field assignments received before the change and processing new grievances.

In a second conversation, Farby agreed with Jaos that they should meet with Union President Tom Balanoff about the new call center system. Farby and Jaos agreed that the new system was very "labor intensive" and that there was insufficient time for the representatives to type closure letters for each of the grievances referred to them. Another business representative, Ted Williams, indicated agreement.

Business Representative Lionel Saffold, who had been on the committee which had recommended the new centralized system, complained to Jaos about the difficulty in handling new calls and following up on old grievances in the field. When Jaos suggested they meet with Balanoff and the Union's Secretary-Treasurer, Chris Andersen, Saffold declined, saying that he didn't want to lose his job.

Representatives Dariuz Kozinski and Robert Pawlaszek also discussed the new system with Jaos and complained about it. However, when Jaos suggested they take their complaints to Balanoff, both were unwilling to do so. Pawlaszek also told Jaos he was afraid of losing his job.

Jaos also discussed his unhappiness with the new system with Rick Owsiany, the head of the new grievance center and Laura Garza, the supervisor of the representatives for industrial janitors. Garza indicated agreement with his criticisms of the system and encouraged Jaos to set up a meeting with Balanoff.

Additionally, Jaos told Kenneth Munz, an assistant to Union President Balanoff, that he was getting complaints from members regarding the system and suggested a meeting with Balanoff. Jaos met with Balanoff and Andersen on October 13, and told them that he was getting complaints about the new system from members and that further training was needed for some of the representatives. Balanoff and Andersen agreed with Jaos' suggestions regarding training.

On November 11, 2003, as he arrived at work, Jaos entered an elevator with Balanoff. According to Jaos, Balanoff criticized Jaos and his immediate supervisor, Carl Riconi, for their handling of a question about the call center at a meeting with representatives of ABOMA, an association of residential apartment employers. Balanoff testified he chastised Jaos for contradicting Riconi in front of the ABOMA representatives.[1]

Jaos called Balanoff's secretary and set up a meeting in the latter's office two hours later. At this meeting, Jaos recommended to Balanoff that the Union go back to its previous system or something close to it. He asked that representatives be assigned to a specific geographic area in which they would perform a variety of functions. Jaos testified that he suggested a meeting with all the business representatives to discuss the new system and that Balanoff agreed.

Balanoff testified that at first Jaos asserted that a number of union members had problems with the new system. However, according to Balanoff, when he asked Jaos for the names of such members, Jaos said that it was building managers who were critical of the system. However, Balanoff also testified that Jaos told him that Balanoff should have let the business representatives vote on the new system. Balanoff testified that he replied by noting that the new system been approved by the Union's Executive Board, which was elected by the membership.

Six days later, on November 17, 2003, Balanoff summoned Jaos to his office and handed him a termination letter (GC Exh. 3). Jaos' termination letter stated:

> You have taken several opportunities to express to me and other officers your concern and dissatisfaction with the new system. Your complaints and suggestions were noted, but not accepted.
>
> On November 11th you and I met at your request wherein you raised complaints about the program, insisted the previous system was effective, and proposed a change that for all intents and purposes would dismantle the reorganization.
>
> At that point, I explained to you the reasons why the executive board adopted this very important program to service Local 1 members, and that the executive board is not willing to reverse the reorganization that is in place. It is apparent you are having great difficulty working within the new system and that you oppose it.

[1] Jaos denies contradicting Riconi.

Your unwillingness to assist in the implementation of our program is clearly designed to undermine our efforts to properly serve the members, and is further designed to reverse the executive board's decision to reorganize and restructure the way the union provides services to its members.

Your refusal to participate and assist in the efficient implementation of this program interferes with our efforts to develop innovative and important member service programs, and constitutes disloyalty and insubordination.

These actions cannot be tolerated and your continued employment is contrary to the interests of our union.

Effective immediately, your employment with SEIU Local 1 is terminated.

Balanoff testified that between his November 11 meeting with Jaos and presenting the termination letter to Jaos on November 17, he learned that that Jaos had criticized the new call center in conversations with Mona Ballinger, the head of Respondent's security division, and Balanoff's special assistant, Kenneth Munz. Balanoff was told that Jaos, "basically, trashed the system, said it was only about Tom Balanoff wanting people, …reps to go out and collect COPE [political education] money" (Tr. 230).

Balanoff further testified that learning of these conversations "reinforced my distrust, at this point, in Mr. Jaos' continuing to work in this system (Tr. 231)." I infer from this testimony that when Balanoff learned that Jaos was telling people in the Union that Balanoff instituted the new call center system primarily, if not exclusively, to increase contributions to COPE, that this information precipitated Balanoff's decision to terminate Jaos.

There is no credible evidence that Jaos did anything to undermine or interfere with the implementation of the new call center system other than complain about it, question the motivation for its implementation and attempt to gain the support of other business representatives in seeking to have the Union's management reverse course.

Analysis

For the reasons that follow, I conclude that Respondent terminated Remzi Jaos for engaging in concerted activity that is generally protected by the Act. However, I also conclude that Respondent did not violate Section 8(a)(1) because its legitimate countervailing interests outweigh Jaos' Section 7 rights.

In order to prove a violation of Section 8(a)(3) or 8(a)(1), the General Counsel must establish that union activity or other protected activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel generally must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.[2] Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the

[2] *Flowers Baking Company, Inc.,* 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.,* 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB,* 70 F. 3d 863 (6th Cir. 1995).

employee had not engaged in protected activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *Gary Enterprises,* 300 NLRB 1111 (1990).

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*… (emphasis added)."

In *Myers Industries (Myers I),* 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action, *Whittaker Corp.,* 289 NLRB 933 (1988); *Mushroom Transportation Co.,* 330 F.2d 683, 685 (3d Cir. 1964). The fact that an employee is unsuccessful in persuading fellow employees to protest their wages, hours or working conditions is immaterial in assessing whether an appeal to coworkers is "concerted", *El Gran Combo,* 284 NLRB 1115, 1117 (1987).

In the absence of any contrary evidence, I credit Jaos' testimony that he spoke to several coworkers in order to persuade them to meet with Union President Balanoff with the object of at least modifying their working conditions in the new call center system. Thus, I find that Jaos engaged in protected concerted activity.

Nevertheless, Respondent argues at page 27 of its brief, Jaos conduct was not protected because his activities were not seeking "mutual aid or protection," citing the recent Board decision in *Holding Press, Inc.,* 343 NLRB No. 45 (October 15, 2004). I conclude otherwise. Unlike *Holding Press*, other employees expressed reservations about the call center system in their discussions with Jaos. Moreover, Joas' uncontradicted testimony establishes that he sought to initiate group action to address these reservations with union management.

Additionally, the Board held in *Amelio's,* 301 NLRB 182 (1991) that in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity. Based on Jaos' testimony that, on November 11, he suggested that Balanoff meet with the business representatives and Balanoff's testimony (Tr. 228-30) that Jaos stated that Balanoff should have let the Union's staff vote on the new system before implementing it, I find that Respondent was aware of the concerted nature of Jaos' complaints, and the fact that Jaos sought to address concerns of business representatives other than himself.

I find that Respondent terminated Remzi Jaos for his persistent complaints and criticism of the new call center system, his lobbying for a return to the old system, his activities to enlist other union employees in this effort and rendering his opinion as to Balanoff's motives for implementing the new system.

Although Respondent introduced evidence regarding two instances in which Jaos was counseled for failing to call members back in a timely manner, it did not rely on any alleged misconduct in terminating Jaos. Respondent also alleged that Jaos contradicted his supervisor in front of employer representatives. It also suggests, based on his casual remark to Ken Munz

that members didn't know about the new system (Tr. 195), that Jaos was less than diligent in distributing flyers that informed union members about the call center. Respondent did not specifically mention these factors in its termination letter and I conclude that, even if Respondent had a good faith belief regarding these matters, they did not contribute to the termination decision.

I credit Thomas Balanoff's testimony at transcript pages 230-31 and conclude that the decision to terminate Jaos was precipitated by Balanoff's learning, between November 11, and 17, 2003, that Jaos told Munz and Ballinger that Balanoff's sole motive for instituting the call center was to increase political contributions. Although other representatives made general complaints about the new system, there is no evidence that anyone but Jaos voiced his opinion concerning the heightened emphasis on COPE, or that Jaos made such an assertion in discussions with other union employees.

I conclude that the General Counsel has established that Respondent terminated Jaos at least in part for protected concerted activity. Assuming that Jaos' statements to Munz and Ballinger regarding Balanoff's motives can be distinguished from his protected activities, Respondent has not shown that it would have terminated Jaos even if he had not engaged in protected activity. Moreover, nothing that Jaos did or said in trying to get the Union to scrap the call center system forfeited his protection under the Act. More specifically, Jaos' remarks which questioned Balanoff's motives for instituting the new call center system were not sufficiently flagrant, violent or extreme as to negate their protected nature, *Dreis & Krump Manufacturing, Inc.,* 221 NLRB 309, 315 (1975). Outside the context of a labor organization, I would analogize Jaos' remarks to those of an employee questioning whether a particular management official was more interested in his or her personal advancement than with the performance of the employer's business. I would not regard such remarks to be unprotected if they otherwise constituted protected concerted activity within the meaning of Section 7.

Nevertheless, Respondent argues that it was entitled to discharge Jaos on the grounds that it had a legitimate countervailing interest that outweighs Jaos' Section 7 rights. Citing *Operating Engineers Local 370,* 341 NLRB No. 114 (April 30, 2004), Respondent contends that it has a right to demand cooperation from its paid employees and appointed representatives, and may discharge those who are hostile to or in disagreement with the leadership of the Union in the interest of promoting internal unity. The *Local 370* case is distinguishable from the instant case in that the matters therein, for which Operating Engineers Local 370 fired organizer Melvin Thoreson, had no impact on Thoreson's working conditions. Thoreson repeatedly criticized Local 370 for allowing employers to cease making pension fund contributions on behalf of probationary apprentices. Since Thoreson was not an apprentice, "the contribution waiver had no impact on his own working conditions as an employee of the Local," (*Ibid.* at slip opinion page 4). In the instant case the implementation of the new call center had a profound impact on the working conditions of Jaos and other business representatives, in that it materially changed the nature of their duties and daily work activities.

Despite this distinction there remains an open question under *Local 370* and two United States Supreme Court cases as to whether Respondent's right to demand cooperation from its paid employees outweighs Remzi Jaos' Section 7 rights. In *Local 370,* the Board observed, citing *Eastex, Inc. v. NLRB,* 437 U.S. 556 (1978), that the Board and the courts may balance employees' Section 7 rights with their employer's countervailing interests. The Board then analyzed Local 370's countervailing interests by discussing cases in which courts and the Board have recognized a labor organization's legitimate interest in speaking with one voice and in internal unity.

The Board began it analysis by discussing *Finnegan v. Leu,* 456 U.S. 431, 102 S. Ct. 1867 (1982). In that case, the Supreme Court held that a union did not violate the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 401 *et seq.* when the victorious candidate for president of Teamster Local 20 discharged business representatives who had been appointed by his opponent several years previously. Chief Justice Burger writing for the Court opined that the LMRDA "does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own."

> Far from being inconsistent with this purpose, the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of a union election.

456 U.S. at 441.[3]

Relying on *Finnegan v. Leu* and several Board cases arising under Section 8(b)(1)(A),[4] the Board opined that "Local 370 could legitimately demand the loyal service and cooperation of Local 370's employees in important positions like Thoreson's in the implementation of its policies," *Local 370, supra,* (slip opinion at page 3). It also opined that, "Local 370 had a legitimate interest in the support of its key paid employees for its contribution waiver policy. Therefore, it had legitimate and substantial reasons to be hostile to Thoreson for his relentless attacks on that policy," *Ibid,* (slip opinion at page 4).

The Board then proceeded to weigh Local 370's interests against Thoreson's Section 7 interests in criticizing the Local's concessions made at the expense of the apprentices. It found that the Local's legitimate interests outweighed Thoreson's Section 7 rights.

Implicitly, the Board recognizes that an employer which is a labor organization has legitimate interests in loyalty and internal unity that are different than those of employers who are not labor organizations. Given the fact that Balanoff is the elected president of the Respondent Union and that Remzi Jaos was an appointed business representative, I conclude that the Union's interest in having employees who support the policies of the elected leadership outweighs Jaos' Section 7 rights. In *Finnegan v. Leu, supra,* the Supreme Court held that an elected union leader may choose staff whose views are compatible with his or her own. Similarly, I conclude that an elected union leader may chose to retain only those appointed staff members sympathetic to his or her policies. Moreover, such an official may make such personnel decisions regardless of whether the appointed staff members have concertedly protested the elected official's policy decisions, even if the concerted protest involves the staff members' working conditions, which do not outweigh legitimate interests of the union.

The instant case essentially involves balancing the union's interest in implementing a markedly different way of servicing its members with Remzi Jaos' interest, albeit discussed with other representatives, in performing his job in the same manner as he had in the past. I find the interests of the elected union leadership in administering the union in a manner which they deem

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[3] In *Sheet Metal Workers' International Association v. Lynn*, 488 U.S. 347, 109 S. Ct. 639 (1989), the Court held that a union could not discharge an elected union business agent for opposing a dues increase proposed by a trustee appointed by the International Union. The Court found that the discharge violated the LMRDA because it was inconsistent with the Act's objectives in promoting union democracy.

[4] *Service Employees Local 254 (Brandeis University),* 332 NLRB 1118 (2000) and *Shenago, Inc.,* 237 NLRB 1355 (1978).

most effective, outweighs Jaos' interest in retaining the job duties he deems most satisfactory, challenging or rewarding. Therefore, I conclude that Respondent did not violate Section 8(a)(1) in terminating the employment of Remzi Jaos.

Conclusion of Law

Respondent did not violate Section 8(a)(1) of the Act in discharging Remzi Jaos for engaging in protected concerted activity.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., December 28, 2004.

Arthur J. Amchan
Administrative Law Judge

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.